

IN THE SUPREME COURT OF FLORIDA

ROBERT LOUIS GIVENS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC03-1405

L.T. No. 2D02-3084

ON PETITION FOR DISCRETIONARY REVIEW FROM  
THE SECOND DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE AND FACTS

In *Givens v. State*, 851 So. 2d 813 (Fla. 2d DCA 2003), the Defendant/Petitioner, Robert Louis Givens, appealed his judgment and sentence for failure to register as a sexual offender under § 943.0435, Fla. Stat. (2001). Givens argued the statute violated both procedural due process and ex post facto principles. In affirming Petitioner's judgment and sentence, the Second District Court explained,

Givens argues that the sexual offender registration and notification requirements in sections 943.0435 and 944.607, Florida Statutes (2001), violate procedural due process because he was not afforded a hearing to determine whether he was a danger to the public before being subject to the statutory requirements. After the parties filed their briefs, this court in *Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA 2003), held that the Florida Sexual Predators Act, section 775.21, Florida Statutes (2000), does not violate procedural due process and declined to follow *Espindola v. State*, 28 Fla. L. Weekly D222, \_\_\_ So. 2d \_\_\_, 2003 WL 118634 (Fla. 3d DCA Jan 15, 2003). Givens states in his brief that his argument is the same as in *Espindola*, and he relies on that case to support his position. In *Milks* this court recognized that the United States Supreme Court had recently held in *Connecticut Department of Public Safety v. Doe*, \_\_\_ U.S. \_\_\_, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003), that under a Connecticut sexual offender statute, procedural due process "did not entitle the defendant to a hearing to establish whether he or she was dangerous, as that fact was not material under the statute." *Milks*, 848 So. 2d at 1169. The relevant fact is whether the defendant has been convicted of a specific crime, and the defendant is entitled to procedural due process before that conviction is entered. See *id.*

Although *Milks* dealt with the sexual predator, not sexual offender, designation, we note that the sexual predator requirements are more onerous than the sexual offender requirements. Furthermore, the Fifth District has specifically held that the sexual offender registration and notification requirements do not violate procedural due process. See *Johnson v. State*, 795 So. 2d 82, 89 (Fla. 5th DCA 2001). We agree and hold that Givens' procedural due process rights were not violated.

Givens also contends that the sexual offender registration statute violates ex post facto principles because section 943.0435 was enacted after Givens began serving his sentence. Again, after the parties filed their briefs, the United States Supreme Court held in *Smith v. Doe*, \_\_\_ U.S. \_\_\_, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), that the Alaska Sex Offender Registration Act is nonpunitive and that, therefore, its retroactive application does not violate the Ex Post Facto Clause. In addition, the First and Fourth District have held that section 943.0435 is procedural in nature and does not violate the Ex Post Facto Clause. See *Freeland v. State*, 832 So. 2d 923 (Fla. 1st DCA 2002); *Simmons v. State*, 753 So. 2d 762 (Fla. 4th DCA 2000). We agree and hold that the application of section 943.0435 to Givens does not violate ex post facto principles. Accordingly, we affirm Givens' judgment and sentence for failure to register as a sexual offender.

*Givens*, 851 So. 2d at 814-815

Petitioner now seeks review of the decision of the Second District Court of Appeal in *Givens v. State*, 851 So. 2d 813 (Fla. 2d DCA 2003).

**SUMMARY OF THE ARGUMENT**

In *Givens v. State*, 851 So. 2d 813 (Fla. 2d DCA 2003), the defendant's dual constitutional challenges to Florida's sexual offender registration act were rejected by the Second District Court. First, the defendant's "procedural due process" claim was rejected by the Second District in *Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA 2003), citing the United States Supreme Court's recent decision in *Connecticut Department of Public Safety v. Doe*, \_\_\_ U.S. \_\_\_, 123 S.Ct. 1160, 155 L.Ed.2d 98, (2003), and *Johnson v. State*, 795 So. 2d 82 (Fla. 5th DCA 2001). The Second District specifically declined to follow *Espindola v. State*, 28 Fla. L. Weekly D222 (Fla. 3d DCA January 15, 2003). Second, the defendant's ex post facto claim was also rejected in light of *Smith v. Doe*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), and Florida district court decisions in *Freeland v. State*, 832 So. 2d 923 (Fla. 1st DCA 2002) and *Simmons v. State*, 753 So. 2d 762 (Fla. 4th DCA 2000).

This Court should decline to review the Second District Court of Appeal's decision in *Givens* because Petitioner has not demonstrated any basis under the Florida Constitution or the Florida Rules of Appellate Procedure for this Court to review the decision of the Second District. Moreover, Petitioner has

failed to identify any misapplication of precedent or defect in the Second District Court's opinion which should be addressed by this Court.

## ARGUMENT

### ISSUE

**THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE SECOND DISTRICT COURT IN *GIVENS V. STATE*, 851 So. 2d 813 (Fla. 2d DCA 2003) WHICH FOLLOWED *CONNECTICUT DEPARTMENT OF PUBLIC SAFETY V. DOE*, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003) and *SMITH V. DOE*, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).**

(As restated by Respondent)

The parameters of the Florida Supreme Court's appellate jurisdiction are set forth in Article V, Section 3, of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A). These sections identify the several bases for this Court's exercise of its discretionary jurisdiction to review district court of appeal decisions, as follows:

- (i) expressly declare valid a state statute;
- (ii) expressly construe a provision of the state or federal constitution;
- (iii) expressly affect a class of constitutional or state officers;
- (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;

- (v) pass upon a question certified to be of great public importance;
- (vi) are certified to be in direct conflict with decisions of other district courts of appeal;

Fla. R. App. P. Rule 9.030(a)(2)(A)

Petitioner fails to identify any of the conditions set forth in Rule 9.030(a)(2)(A) which would invoke this Court's discretionary jurisdiction. Rather, he merely re-submits the merits of the argument urged below and contends the appellate court failed to address the impact of the Florida Constitution's express right of privacy on the due process and ex post facto provisions of the Constitution. Thus, Respondent respectfully asks this Court to deny review.

The State recognizes this Court has jurisdiction under Article V, section (3)(b)(3) of the Florida Constitution to review a decision of a district court which "expressly declares valid a state statute." See also Fla. R. App. P. 9.030(a)(2)(A)(i). However, such jurisdiction is not mandatory, but rather discretionary.

In the instant case, the Second District Court affirmed Petitioner's judgement and sentence for failing to register as a sexual offender, and rejected his dual claims that § 943.0435, Fla. Stat. (2001), violates the constitutional principles of

procedural due process and ex post facto. *Givens v. State*, 851 So. 2d 813 (Fla. 2d DCA 2003). The State questions whether the Second District Court "expressly" declared Florida's sexual offender registration act valid. However, the court did reject the dual constitutional challenges to application of Florida's sexual offender registration act to Petitioner, and the rejection of Petitioner's constitutional challenges is in accord with state and federal precedent. Relief was denied on Petitioner's "procedural due process" claim in light of the U.S. Supreme Court's recent decision in *Connecticut Department of Public Safety v. Doe*, \_\_\_U.S.\_\_\_, 123 S. Ct. 1160 , 155 L. Ed. 2d 98,(2003), and Florida district courts of appeal decisions in *Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA 2003), and *Johnson v. State*, 795 So. 2d 82 (Fla. 5th DCA 2001). Relief was denied on Petitioner's "ex post facto" claim in light of the U.S. Supreme Court's recent decision in *Smith v. Doe*, \_\_\_U.S.\_\_\_, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), and Florida district courts of appeal decisions in *Freeland v. State*, 832 So. 2d 923 (Fla. 1st DCA 2002), and *Simmons v. State*, 753 So. 2d 762 (Fla. 4th DCA 2000). While Petitioner complains the Second District relied largely on federal case law which turned heavily on the federal constitution, as shown, this point lacks merit.

Inasmuch as Petitioner has failed to identify any

misapplication of relevant precedent or any particular defect in the Second District's decision which would render this case worthy of review, the State submits Petitioner has failed to demonstrate the instant case warrants further review by this Court.

Most recently, in *Reyes v. State*, 2003 WL 22082192 (Fla. 4th DCA, September 10, 2003), the Fourth District Court cited both *Connecticut Department of Public Safety and Milks* and held Florida's Sexual Predator Act (which is more onerous than the sexual offender registration act at issue here) does not violate procedural due process rights.

Moreover, the Fourth District squarely addressed the question of whether the registration requirements under the Sexual Predator Act violated the petitioner's right to privacy under Article I, §23 of the Florida Constitution, and determined it did not, stating:

As to substantive due process, Reyes claims that the registration requirements under the Act violate his right to privacy under Article I, section 23 of the Florida Constitution. Whether a statute violates the right to privacy requires evaluation under a compelling state interest standard. *Bd. of County Comm'rs of Palm Beach Cty. v. D.B.*, 784 So. 2d 585 (Fla. 4th DCA 2001). In *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367, 407 (1995), the Supreme Court of New Jersey held that its verison of the Act did not violate an offender's right to privacy

because the information disclosed was public information.

Even assuming, however, that the information disclosed pursuant to the Act is private under the federal or Florida constitutions, the stated and patent public purpose of the Act is a sufficiently compelling state interest justifying such an intrusion on privacy. See *Jackson v. State*, 833 So. 2d 243 (Fla. 4th DCA 2002)...as the state has a compelling interest in notifying the public of the release of sexual predators into their community, we conclude that the Act does not violate the offender's right to privacy.

*Reyes*, 2003 WL 22082192.

Although Petitioner claims the Second District Court failed to address the impact of Article I, §23, on the Florida Constitution's protections of due process of law and against ex post facto laws, it is not clear from Petitioner's initial brief in that court that he expressly raised that issue. The two issues raised in Petitioner's initial brief were whether § 943.0435, Fla. Stat., violated procedural due process or, violated ex post facto principles. Even if the initial brief could be construed as having raised this claim, the argument was not developed. See *Johnson v. State*, 795 So. 2d 82, 90 (Fla. 5th DCA 2001).

Nonetheless, in *Givens v. State*, 851 So. 2d 813, 814 (Fla. 2d DCA 2003), the court cited with approval *Johnson v. State*,

795 So. 2d 82 (Fla. 5th DCA 2001), wherein the Fifth District Court adopted the opinion of the trial court which set forth a detailed analysis as to why the notification and registration requirements did not violate the Florida Constitution's express right to privacy. *Id.* at 85-89. Thus, if Petitioner adequately raised the issue before the Second District Court, by that court's citation of *Johnson*, the question was addressed and rejected. Thus, this Court should decline to exercise its discretion on Petitioner's stated basis that the Second District failed to address the impact of Art. I, §23, on Florida's protections of due process of law and against ex post fact laws.

In *Jenkins v. State*, 385 So. 2d 1356, 1357-1358 (Fla. 1980), this Court discussed the creation of the district courts of appeal and quoted from *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958):

It was never intended that the district courts of appeal should be intermediate courts. . . . To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Ultimately, what has occurred in this case is that one of

the final courts of appellate jurisdiction has simply determined that the legislature has passed a statute which is constitutional. This Court should decline to exercise its discretionary jurisdiction to further review the decision of the Second District Court in *Givens v. State*, 851 So. 2d 813 (Fla. 2d DCA 2003).

**CONCLUSION**

Based on the foregoing facts, arguments, and citations of authority, the State respectfully requests that this Court deny review in the instant case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Answer Brief on Jurisdiction has been furnished by U.S. mail to Brad Permar, Assistant Public Defender, P. O. Box 9000 - Drawer PD, Bartow, Florida 33831, this 23rd day of October 2003.

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**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this pleading is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(1).

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